MARATHON OIL CO.

IBLA 97-209 Decided July 25, 1997

Appeal from a decision of the Colorado State Office, Bureau of Land Management, denying Protest against the Bureau of Land Management's decision to amend and/or delete oil and gas lease parcels from an oil and gas lease competitive sale. COC-60017, etc.

Set aside and remanded; request for stay denied as moot.

1. Administrative Authority: Generally--Administrative Procedure: Administrative Review--Appeals--Rules of Practice: Generally: Appeals

   The Board of Land Appeals will not apply the exception to its jurisdiction set out in Blue Star, Inc., 41 IBLA 333 (1979), in the absence of proof that the Secretary or Assistant Secretary formally endorsed the decision under appeal. Without such a showing, the decision is in fact made by BLM and is therefore subject to the Board of Land Appeals' review under 43 C.F.R. Part 4.

2. Administrative Authority: Generally--Board of Land Appeals--Regulations: Interpretation--Rules of Practice: Appeals: Jurisdiction

   A regulatory preamble, by itself, does not have the force and effect of law. The Board of Land Appeals is the exclusive arbiter of its jurisdiction and is not bound by the interpretation set out in a regulatory preamble of its grant of authority.

3. Administrative Authority: Generally--Board of Land Appeals--Courts--Rules of Practice: Appeals: Standing to Appeal

   Judicial standing and administrative standing are not coextensive; determinations addressing judicial standing do not control when seeking to determine administrative standing. Standing before the Board of Land Appeals is governed by 43 C.F.R. § 4.410(a), which requires that an appellant be a party to the case and be adversely affected by a decision. The question whether BLM has properly exercised the Secretary's

discretion is a matter that is appropriate for review within the Department, and the fact that courts may defer to decisions exercising that discretion renders it imperative that such decisions be reviewed within the Department, as that may be the only opportunity to test adherence to important procedural protections that have been established to ensure that Departmental policy has been followed.

4. Administrative Authority: Generally--Board of Land Appeals--Bureau of Land Management--Resource Management Plans--Rules of Practice: Appeals: Jurisdiction

Appeals challenging the adequacy of BLM's implementation of a Resource Management Plan are within the jurisdiction of the Board of Land Appeals.

5. Bureau of Land Management--Oil and Gas Leases: Applications--Resource Management Plans

The BLM is not strictly bound by the terms of a Resource Management Plan when considering whether or not to put a particular parcel of land up for oil and gas leasing. Leasing decisions set out in a Resource Management Plan are subject to modification based on site-specific study, and BLM has authority to eliminate specific parcels from leasing even where they had been designated in a Resource Management Plan as generally suitable for leasing. However, where no site-specific analysis has been conducted on parcels that are removed from availability for oil and gas leasing contrary to the terms of a Resource Management Plan, the matter is properly remanded to BLM to do such.

APPEARANCES: Craig R. Carver, Esq., Denver, Colorado, for Appellant; Lyle K. Rising, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Denver, Colorado, for the Bureau of Land Management; Edward B. Zukoski, Esq., Boulder, Colorado, for Colorado Environmental Coalition and The Wilderness Society.

OPINION BY ADMINISTRATIVE JUDGE HUGHES

Marathon Oil Company (Marathon) has filed a Notice of Appeal from the January 8, 1997, Decision of the Colorado State Office, Bureau of Land Management (BLM or the Bureau), denying Marathon's Protest against BLM's Decision to amend and/or delete certain oil and gas lease parcels from the competitive sale held on November 14, 1996. 1/

1/ Marathon protested "the unwarranted amendment of" Parcels COC-60017 and COC-60028, and "the deletion of" Parcels COC-60020, COC-60021, COC-60022, COC-60026, COC-60027, COC-60029, COC-60030, COC-60034, and COC-60035.

In late August and early September 1996, Marathon wrote to BLM to nominate various lands for inclusion within the next scheduled BLM competitive oil and gas lease sale. 2/ The parcels cover lands in the Little Snake Resource Area in Moffat County, Colorado. Marathon asserts that it did this only after its exploratory studies and seismic program had identified potential drill sites.

On September 25, 1996, BLM posted notice that the parcels Marathon had named would be offered for competitive lease sale on November 14, 1996. However, before the sale took place, on November 6, 1996, BLM issued "Notice of Addendum #1," advising that various parcels that had been named by Marathon were being deleted from the scheduled lease sales. 3/ The lands covered by an additional parcel were amended. On November 13, 1996, BLM issued "Notice of Addendum #2" deleting portions of two parcels. 4/

The Bureau issued no site-specific analysis stating its reasons for removing the parcels from the lease sale. The record indicates that the parcels were deleted due to their "location within environmentalists' proposed wilderness areas." See BLM 433. 5/

On November 18, 1996, Marathon filed a formal Protest against BLM's actions. The Bureau's Decision denying the Protest confirmed that the parcels were deleted because "[l]ands contained in those parcels are located within an area which has been proposed by the Colorado Environmental Coalition (CEC) and numerous endorsing organizations for wilderness designation." See BLM 17. The Bureau cited a document entitled "Conservationists' Wilderness Proposal for BLM Lands" (Wilderness Proposal), noting:

> As to areas that have been proposed for wilderness designation by CEC and endorsing organizations, there has been no formal administrative guidance for protection of wilderness values in [non-wilderness study area] areas. Because this situation also occurs in a number of other states as well, the Department is developing a policy pertaining to this issue.
>
> In the meantime, BLM will continue to manage these lands in accordance with the land use planning decisions made in Resource Management Plans (RMPs); however, the implementa- tion of oil and gas leasing decisions in these areas will be

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2/ These "nominations" are more accurately characterized by BLM as "informal expressions of interest in leasing" these parcels. See Government's Response to Appellant's Response (Government Response) at 5.

3/ The parcels deleted were COC-60020, COC-60021, COC-60022, COC-60026, COC-60027, COC-60028, COC-60029, COC-60030, COC-60034, and COC-60035.

4/ The description of Parcel COC-60017 was again amended, apparently adding acreage. Parcel COC-60028 was deleted a second time, apparently redundantly.

5/ The Bureau has provided a paginated "Document List." References are to the page numbers associated with specific documents.

> held in abeyance, pending further evaluation by the Department. Special care will be taken to consider natural values in the development of alternatives and analysis of impacts in our environmental assessments for actions proposed or considered in these areas as well.
>
> Lands located within the proposed areas, whether requested informally or by noncompetitive offer to lease, will not be offered for competitive oil and gas leasing at this time.

See BLM 18. The Bureau noted Marathon's right to appeal that decision and named CEC and the Land and Water Fund (LWF) as adverse parties under 43 C.F.R. § 4.413. 6/ Id.

Marathon filed its Notice of Appeal, along with a Statement of Reasons (SOR), Request for Expedited Consideration, and Petition for Stay pending appeal. By Order dated March 6, 1997, we recognized CEC and LWF as Respondents and granted expedited consideration of the matter.

[1] We first address Appellant's contention that this Board lacks jurisdiction to review BLM's decision under the doctrine set out in Blue Star, Inc., 41 IBLA 333 (1979). 7/ Appellant relies on the statement in that case that this Board lacks jurisdiction where a decision by BLM is "made at the direction" of an Assistant Secretary of the Interior. Id. at 336. In Blue Star, the Assistant Secretary of the Interior for Indian Affairs had issued a written order cancelling Indian Homestead patents, in order to return the lands described therein to trust status so that the estates of the patent holders could be probated by the Department. The Assistant Secretary also requested BLM to issue trust patents to the heirs of these individuals for the same lands. The Director, BLM, issued a memorandum to the local State Director instructing him to issue a decision cancelling these patents and providing for the issuance of new trust patents, as directed by the Assistant Secretary. A group of lessees and successors of lessees of various uranium leases on the lands in question appealed the action, but we dismissed the appeal, ruling that,

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6/ The Bureau did not specifically refer to that provision, but its purpose in naming those parties was evident.

7/ Appellant advised that it filed an action challenging BLM's decision in the U.S. District Court for the District of Colorado. Marathon Oil Co. v. Babbitt, Civil Action No. 97-AP-266. Appellant indicated that it desired to have the instant appeal to this Board dismissed because it wished to clarify that BLM's decision was final agency action, such that it was ripe for immediate judicial review. See SOR at 2. On June 16, 1997, the District Court dismissed Marathon's action.

Appellant has not withdrawn the pending appeal and it remains justiciable.

where a decision has been made by an Assistant Secretary of the Interior or at his direction, that decision is not subject to review on appeal to this Board under the procedures prescribed in 43 C.F.R. Part 4, and the Board has no jurisdiction in the matter. Id. at 335.

In The Wilderness Society, 122 IBLA 162 (1992), we declined to review a decision where a BLM State Director issued a decision approving a record of decision for an environmental impact statement regarding a vegetative treatment program and the Assistant Secretary, Land and Minerals Management, subsequently formally concurred in writing in the selection of the vegetative treatment program, prior to the filing of the notice of appeal of the State Director's decision. Id. at 162-64. Similarly, in Marathon Oil Co., 108 IBLA 177 (1989), the Assistant Secretary's written approval of a decision by the Director, Minerals Management Service, barred the bringing of an appeal to this Board. 8/

Marathon asserts that it became aware that "a number of actions, decisions and policies * * * had been earlier adopted by the Secretary and imposed by his office on the Colorado State Office of the BLM." See SOR at 7. Accordingly, it argues, our jurisdiction is barred by Blue Star. Appellant points only to a July 8, 1996, letter from Bob Armstrong, Assistant Secretary, Lands and Minerals Management, to Honorable David E. Skaggs, U.S. House of Representatives, stating:

> Thank you for your letter of April 24, 1996, to Secretary of the Interior Bruce Babbitt, regarding interim protective measures for certain lands in Colorado not presently part of [BLM's] wilderness proposals. Secretary Babbitt has asked me to respond.
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> The Bureau completed its study of all public lands in Colorado for wilderness suitability in 1991 and forwarded recommendations to Congress. This study, mandated in Section 603 of the Federal Land Policy and Management Act, was completed over a 15-year period and resulted in nearly 400,000 acres of 800,000 acres studied being recommended for wilderness designation. Until Congress acts on these recommendations, the Bureau will protect the existing wilderness values within all 800,000 acres of these wilderness study areas (WSA).
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> The Colorado Environmental Coalition has proposed wilderness designation for public lands not included in the Bureau's recommendations to Congress. Though the Bureau's recommendations were comprehensive and open to extensive public

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8/ We also noted that the Board lacks jurisdiction where the Assistant Secretary issues the initial decision, rather than approving an agency decision.

> dialog, it is understandable that when evaluating subjective values, such as apparent naturalness and outstanding opportunities for solitude and primitive recreation, the various interests may arrive at different conclusions.
>
> The overall management of non-WSA lands is established through land use plans. Existing plans have been utilized to protect areas through alternative administrative designations, such as Areas of Critical Environmental Concern, but there is not, nor has there been, any formal administrative interim guidance established specifically to protect wilderness values in non-WSA areas.
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> The Bureau is concerned about the appropriate management of areas which have not been included in its land use plans as wilderness or WSAs but which have been nominated for that status by various interested parties. Because this issue could potentially involve any western Bureau State Offices, several [BLM] State Directors and the [BLM] Washington Office are discussing the development of a Bureau policy on this issue.
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> In the meantime, I understand that the Bureau's Colorado State Director, Mr. Don Glaser, has agreed to hold in abeyance leasing within the areas nominated for wilderness designation by the Coalition, pending clarification of the Bureau's policy on this issue. The Bureau will also evaluate all other proposed activities that may affect the wilderness values of the area of concern to the Coalition and will include an alternative that would protect existing wilderness values in all environmental assessments of proposed projects in these areas. The Bureau will also consider whether reasonable alternatives exist to conduct some proposed activities in a non-impairing manner in the Coalition's proposed WSAs.

See SOR at Ex. H (emphasis supplied). This letter does not constitute approval by Assistant Secretary Armstrong of BLM's actions here. Instead, as demonstrated by the highlighted language, it merely advises Congressman Skaggs of what BLM was doing in regard to the questions he had previously raised.

Marathon alludes very generally to the fact that CEC "prepared and presented to officials with the Department (the precise identity of whom is unknown to Marathon)" a proposal to "manage over 200,000 acres of BLM lands in Colorado as if they were statutory wilderness areas." See SOR at 7. However, Marathon recognizes that it was BLM that took the action it objects to, that is, that "BLM determined to reverse and discard the final, published results of the Department's extensive wilderness review study conducted under the auspices of § 603 of FLPMA." Id.

Marathon also indicates that "instructions were issued to state office personnel that they comply scrupulously with the requests made by CEC in its brochure," and "BLM was instructed to ignore and violate its own existing plans and regulations." See SOR at 8 (emphasis supplied). Marathon neglects to inform us who issued such instructions, when, or how. There is no evidence that the Secretary or Assistant Secretary directed or formally endorsed a decision as to the specific parcels at issue here. Without such a showing, the decision is in fact made by BLM and is therefore subject to review under 43 C.F.R. Part 4.

[2] The Bureau asserts a different ground for dismissing the present appeal, asserting that this Board lacks jurisdiction to review a BLM decision to remove a parcel from a competitive sale. See Government's Motion to Dismiss at 2. The Bureau points to the following language in the Preamble to the rulemaking wherein procedures for lease sales were adopted:

> Several comments suggested inclusion in the final rulemaking of a provision to allow a person who has submitted an informal expression of interest the opportunity to appeal if the Bureau withdraws a parcel from competitive sale. This suggestion to make a Bureau action to withdraw a parcel an appealable decision has not been adopted.

53 Fed. Reg. 22829 (June 17, 1988). 9/

It is established that a regulatory preamble, by itself, does not have the force and effect of law. Ohio Manufacturers' Association v. City of Akron, 628 F. Supp. 623, 634 (N.D. Ohio 1986), rev'd on other grounds, 801 F.2d 824 (6th Cir. 1986), cert. denied, 484 U.S. 801 (1987) (citing Chrysler Corp. v. Brown, 441 U.S. 281, 315 ! 16 (1979)); James R. Ragsdale, 137 IBLA 243, 246-47 (1996). While a regulatory preamble may be used to interpret an ambiguous regulation, it cannot derogate the plain words of the regulations or enlarge their meaning. See Ronald Valmonte, 87 IBLA 197, 201 (1985). "Regulatory preambles * * * may be useful aids in the interpretation of an ambiguous regulation, but they cannot supplant the regulation, itself." Id. at 201. The regulation in question here is 43 C.F.R. § 4.410, establishing the jurisdiction of this Board. The

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9/ Under 43 C.F.R. § 3120.3-1, the Director of BLM has authority to "elect to accept informal expressions of interest" in leasing parcels, in lieu of accepting "nominations requiring submission of the national minimum acceptable bid." On June 17, 1988, the Director announced that he had elected "to permit informal expressions of interest" and that he declined "to implement a formal nomination process at this time." 53 Fed. Reg. 22814 (June 17, 1988). As far as we know, the election to accept informal expressions of interests in lieu of formal nominations with bid moneys was in effect at the time at issue here.

Board is the exclusive arbiter of its jurisdiction. Texas Oil & Gas Corp., 58 IBLA 175, 180, 88 Interior Dec. 879, 882 (1981). Thus, it is the exclusive arbiter of the meaning of 43 C.F.R. § 4.410 and is not bound by the interpretation set out in the regulatory preamble.

[3] We note initially that we are not bound by the ruling of the U.S. District Court for the District of Colorado in Marathon Oil Co. v. Babbit, Civil Action No. 97-AP-266 (Order on Motion to Dismiss (June 16, 1997)), ruling that that Court lacks the power to redress Marathon's claimed injuries from BLM's actions here, because of the Department's broad discretion in determining whether to make land available for leasing. First, it is established that judicial standing and administrative standing are not co-extensive; determinations addressing judicial standing do not control when seeking to determine administrative standing. High Desert Multiple-Use Coalition, 116 IBLA 47, 48-49 n.1 (1990); Colorado Open Space Council, 109 IBLA 274, 286 (1989); In Re Pacific Coast Molybdenum, 68 IBLA 325, 332 (1982). Standing before the Board is not governed by determinations on judicial standing, but by 43 C.F.R. § 4.410(a) which requires that the appellant be a party to the case and be adversely affected by a decision. Second, the question of whether BLM has properly exercised the Secretary's discretion is a matter that is appropriate for review within the Department.

We are not convinced by BLM's assertion that no right of appeal exists because the filing of an informal expression of interest creates a "mere hope or expectancy" rather than a property interest. See BLM's Response to Appellant's Response at 9. It is admittedly well established that an application for an oil and gas lease is properly characterized as a hope or expectancy rather than a vested property right. Schraier v. Hickel, 419 F.2d 663 (D.C. Cir. 1969); McDade v. Morton, 353 F. Supp. 1006, 1010 (D.D.C. 1973), aff'd, 494 F.2d 1156 (D.C. Cir. 1974); Altex Oil Corp., 73 IBLA 73 (1983). The discretion reserved to the Secretary of the Interior to accept or reject a lease offer also means that the Secretary is not precluded from withdrawing the land from mineral leasing and then rejecting a previously filed lease offer on the basis of that withdrawal. Until issuance of a lease, a lease offer will not be considered a valid existing right, which is "immune from denial or extinguishment by the exercise of secretarial discretion" and thus excepted from the effect of a withdrawal. The Bureau of Land Management Wilderness Review and Valid Existing Rights, Solicitor's Opinion, 88 Interior Dec. 909, 912 (1981). The filing of an oil and gas lease application or offer is a mere hope or expectancy, as against the Government, since it creates no property interest, such that rejection of the offer by BLM does not violate constitutional due process. See, e.g., Thomas J. Florence, 103 IBLA 255, 258 (1988).

However, we have not ruled that there is no right to administrative review of BLM decisions rejecting applications for oil and gas leases. To the contrary, we have always allowed such appeals. The implication of these holdings is that, although Constitutional due process protections

such as right to compensation or to receive an evidentiary hearing prior to deprivation are not invoked, a party may nevertheless be "adversely affected" by a decision denying its offer or application within the meaning of 43 C.F.R. § 4.410(a).

[4] Although there was no offer or application here, it is well established that appeals challenging the adequacy of BLM's implementation of an RMP are within the Board's jurisdiction. See 43 C.F.R. § 1610.5-3(b); Colorado Environmental Coalition, 130 IBLA 61, 65 (1994); Headwaters, Inc., 101 IBLA 234, 237-38 (1988). The area in question is governed by the Little Snake River RMP. Further, that RMP expressly provides that the lands in these parcels are "open to oil and gas leasing and development, subject to the lease terms and (as applicable) lease stipulations noted in" that RMP. See Little Snake River RMP Amendment (SOR at Ex. A) at 3. Appellants affirmatively assert that BLM's decision not to put the parcels up for lease violates that RMP.

By protesting, Appellant became a "party to the case" within the meaning of 43 C.F.R. § 4.410(a). Appellant alleges that it has expended funds and the time of its personnel toward studying the oil and gas producing potential of the Little Snake Resource Area, including developing an "expensive 3-D seismic program to develop potential locations for drilling." It also points to the fact that BLM's refusal to put the parcels up for lease denies it the chance to secure leases on lands surrounding areas that it wishes to develop for protective purposes. 10/ We hold that

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10/ Appellant asserts as follows:

"[Appellant's] reviews of the Oil and Gas Plats in the state office * * * demonstrated that the region had been leased for many years. Certain of [Appellant's] target region was under lease, and became the subject of negotiations for farm-in or joint participation agreements. Other lands had previously been leased, and accordingly were available for nomination and competitive leasing. Still other lands were subject to leases which were on the verge of expiring.

"[Appellant] relied upon these facts and the law in making its decision to conduct regional geological studies in the area, to conduct a 3-D seismic program, and to enter into farm-in arrangements containing strict drilling requirements with existing lessees. To date, [Appellant] has expended approximately $3.5 million in its exploratory efforts in the area. [Appellant's] contracts were negotiated to allow [Appellant] the opportunity to delay its exploratory drilling just long enough to give it an opportunity to bid for new leases in the vicinity of its proposed drilling before its drilling locations became public. Timing in such matters in critical. If lands which are in the nearby vicinity of an exploratory well become available for lease after the location and/or results of that well are known, then any increase in value of such lands which is directly attributable to the expenditure of [Appellant's] risk capital will be enjoyed by others, at [Appellant's] expense. That

Appellant has alleged facts sufficient to show that it is adversely affected by BLM's decision, and that it therefore has standing to appeal from BLM's denial of its protest against its decision not to open these parcels to oil and gas leasing, as its economic interests in seeking development of the areas would be injured by an incorrect decision.

[5] Turning to the merits, we have held that BLM is not strictly bound by the terms of an RMP when considering whether or not to lease a particular parcel. Indeed, BLM has authority to eliminate specific parcels from leasing even where they had been designated in an RMP as generally suitable for leasing. Amendment of the governing RMP would not be necessary whenever site-specific analysis indicated that lands which had been designated in the RMP as generally suitable for leasing without restrictions should not be leased at all. Colorado Environmental Council, 125 IBLA 210, 222 n.13 (1993).

What is missing in this matter is any site-specific analysis as to the particular parcels involved herein. There is no doubt that BLM enjoys considerable discretion to depart from its RMP in any specific case, and it may well be able to justify excluding these parcels from leasing for environmental purposes, but it has not yet done so on a case-by-case basis. In these circumstances, it is appropriate to set aside BLM's Decision denying Marathon's Protest and to remand the matter to BLM for further consideration of that Protest, including preparation of site-specific analyses concerning the parcels it has determined are not available for leasing.

We note that the Colorado State Office, BLM, has adopted by Instruction Memorandum (IM) No. CO-97-044, a "Policy for the Management of Lands Described in [CEC's] Wilderness Proposal for [BLM] Lands." That policy appears to arrive at much the same conclusion we reach herein, specifically by imposing the following step: "Initiate an evaluation of an area or areas whenever discretionary actions that might have irreversible or irretrievable impacts are proposed in the areas recommended for wilderness by the CEC." (Government's Motion to Take Official Notice, Enclosure B at 2.) Other specific steps outlined in the IM require review of the specific areas involved to determine whether wilderness criteria have been met, such that a decision not to put those particular lands up for leasing might be justified on a case-by-case basis.

In view of our ruling on the merits, the pending Request for Stay is denied as moot.

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fn. 10 (continued)
circumstance eliminates a significant portion of the profit potential of an exploratory program, and makes the drilling of the first well less economic, or – in may cases – entirely uneconomic. Since risk and speculation are intrinsic to the exploratory business, it is impossible to quantify with any precision the monetary impact of applying the department's unpublished, unknown and entirely illegal 'interim policy' against [Appellant]. However, that damage is significant, and it compounds with each further delay."

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the Decision denying Marathon's Protest is set aside, and the matter is remanded for further action consistent with this Decision.

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David L. Hughes
Administrative Judge

I concur:

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Franklin D. Arness
Administrative Judge